

MAR 31 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

RICHARD ANTHONY TUCKER,

Plaintiff - Appellant,

v.

D. J. MOELLER, # 26148 in both their
personal and official capacities; DOES, 1
THROUGH 100, inclusive; CITY OF LOS
ANGELES,

Defendants - Appellees.

No. 01-57085

D.C. No.
CV-97-03516-WJR/BQR

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted March 4, 2003
Pasadena, California

Before: PREGERSON, THOMAS, Circuit Judges, and JORGENSEN, District
Judge**

* This disposition is not appropriate for publication and may not be cited to or
by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Cindy Jorgenson, United States District Judge for the
District of Arizona, sitting by designation.

Richard Tucker appeals the judgment of the district court. We affirm. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here in detail. However, we note that this is the second time we have considered this case on appeal. In the first appeal, we reversed the grant of summary judgment because of the existence of genuine issues of material fact concerning the arrest. Those fact issues have now been resolved by a jury.

Based on the facts as they have now been determined, we concluded that Tucker's rights under the Fourth Amendment were not infringed by his arrest. Because statutes are presumed to be constitutional until judicially declared otherwise, an arrest made with probable cause in reliance upon a statute thereafter declared unconstitutional on its face or as applied is usually valid and will not give rise to an action under § 1983. See Michigan v. DeFillippo, 443 U.S. 31, 38 (1979) ("The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality."); Pierson v. Ray, 386 U.S. 547 (1967) (Police officer should be excused from liability under § 1983 for false arrest and imprisonment for making arrest under statute that he reasonably believed to be valid but was later held unconstitutional on its face or as applied).

No court has yet declared Los Angeles Municipal Code § 55.10 unconstitutional; thus, the officer did not commit an unconstitutional act by acting

in reliance upon the ordinance. Given that the officer was entitled to a reasonable belief as to the ordinance's constitutionality and that the jury found that the knife was in plain view, probable cause existed for the arrest. Therefore, Tucker's constitutional rights were not infringed, and the district court was correct in granting summary judgment on his § 1983 claims.

The district court dismissed Tucker's state law claims as untimely. Under California law, personal injury claims against public entities must be presented "not later than 6 months after the accrual of the action." Cal. Gov't Code § 911.2. The district court based its conclusion that the claims were time-barred on theory that the claims accrued when Tucker was incarcerated. However, under California law, the relevant causes of action accrue upon release from custody, not from the date of initial incarceration. See Scannell v. County of Riverside, 199 Cal Rptr. 644, 648 (Ct. App. 1984) (tolling cause of action for § 911.2 purposes from date of plaintiff's release from custody); Milliken v. City of South Pasadena, 158 Cal. Rptr. 409, 412 (Ct. App. 1979) ("Although a cause of action arose at the time of arrest and initial imprisonment, the statute of limitations did not commence to run until appellant's discharge from jail."); Collins v. County of Los Angeles, 241 Cal. App. 2d 451, 455 (Ct. App. 1966) (date of release from custody determined

accrual of the action). Thus, the district court erred in dismissing the state law claims with prejudice.

In sum, we affirm the judgment of the district court on the federal claims and reverse the dismissal with prejudice on the state law claims. We need not, and do not, reach any other issue presented by the parties. Nothing in this disposition should be read as precluding the district court from declining to exercise supplemental jurisdiction over the remaining state law claims upon remand. See Patel v. City of San Bernardino, 310 F.3d 1138, 1142 n.6 (9th Cir. 2002) (“On remand, the district court should first consider whether to exercise supplemental jurisdiction over the plaintiffs' state law claim. If it does not, it should dismiss that claim without prejudice.”). Each party shall bear their own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.